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11 IN THE SUPREME COURT OF THE STATE OF ARIZONA

12 In the Matter of:) Supreme Court NO. R-06-0016
13)
14) COMMENT OPPOSING PROPOSED
15) TERMINATION OF THE RIGHT TO THE
16) PHYSICAL ATTENDANCE OF A
17) MAGISTRATE AT INITIAL
18) APPEARANCES

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Judy A. Lutgring, undersigned counsel, is an attorney at the Office of the Public Defender of Pima County. She has worked in the Initial Appearance group for nearly three years. As a defense attorney, she has witnessed firsthand the interactions between ten magistrates and over 3,000 defendants, as well as the evolution of the Pima County Initial Appearance process. She has received feedback about the process not only from the defendants but also from their families. She has worked in a civil firm as well as at the Public Defender Offices in Maricopa and Cochise Counties during the past 22 years.

Counsel respectfully urges the Court to protect the integrity, as well as the public perception of the integrity, of the criminal justice process, as well as of the right of defendants, by preserving the right that defendants have to be judged by magistrates who are physically

1 present when the release determinations and introduction to the criminal court system occurs, at
2 Rule 1.6 Initial Appearance hearings.
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5 **I. Initial Appearances are hearings at which a defendant's presence before the judge has**
6 **a substantial relation to the fullness of his opportunity to defend against the charge.**

7 Initial Appearances are hearings at which the judge determines release conditions. These
8 decisions have been based on:

9 -statements of the defendant. This may be to explain that he did not receive notice of a
10 summons for a court date at which he failed to appear; that he actually did resolve a warrant,
11 when, where and how; his understanding of the gravity of the need to appear in the future, and
12 his promise to do so; his understanding of the rules of potential release involving no contact
13 with victims; and financial circumstances;
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15 -the defendant's demeanor during the Initial Appearance hearing, including his body
16 language, his evasiveness or directness in responding to the judge, and his behavior in the
17 courtroom;
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19 -the probative value of the defendant's physical characteristics: this has been the decisive
20 factor numerous times where the defendant has not matched the physical description in an arrest
21 warrant, resulting in release without bond; or the display of physical injuries or disabilities that
22 support assertions of disability status, the need to attend continuing medical treatment while at
23 liberty, and the incentive that such treatment provides the defendant to remain in the county and
24 out of custody;
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26 -the offering of documents to the judge. This has ranged from official immigration cards
27 as proof of legal residence, to copies of a prescription to negate an accusation of illegal
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1 possession of that drug, to copies of pertinent cases and statutes.

2 Because this is a hearing at which documents and facts are offered, at which the
3 defendant may make statements, at which the defendant consults with his attorney before and
4 during the hearing, and at which his attorney advances arguments on his behalf, the same reasons
5 that support having a physically-present judge at post-indictment bond hearings and at trials
6 apply. The law supports the fact that physically watching a witness testify assists the fact-finder
7 in assessing truthfulness – body language, tone of voice, as so on. In *Ritland v. Arizona State*
8 *Board of Medical Examiners*, 213 Ariz. 187, 190, 140 P.3d 970, 973 (App. Div. 1) the court even
9 discussed the deference given to an Administrative Law Judge based on the fact that “he has
10 indeed had the opportunity to look the witness in the eye and reach a conclusion with respect to
11 his veracity or lack thereof.” One cannot look another in the eye through a video.

12 As pointed out in the Minority Report, Justice Scalia stated that a decision made in a
13 room that “contains a television set beaming electrons that portray the defendant’s image” is not
14 the same as a decision made in the physical presence of a person.” *Order of the Supreme Court*
15 *on Court Rules*, 207 F.R.D. 89, 94 (2002).

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21 **II. The integrity of the criminal justice system depends in part on the fact and the**
22 **perception, for both defendants and the public, that bond hearings are taken seriously**
23 **enough to merit a live audience with a magistrate who can look the defendant in the**
24 **eye and make liberty determinations to his face.**

25 The Vision Statement of the Arizona Supreme Court makes clear that the Court strives to
26 “provide Arizona’s citizens with an . . . accessible . . . judicial system, that maintains a high
27 degree of public trust and confidence . . .”

28 Nobody has taken a poll of the public in attendance at these hearings. However, as a
Public Defender, counsel has received feedback from defendants and their families. They want

1 their doubts and fears about the justice system to be known. One Pima County Public Defender
2 recently received a letter from the elderly father of a client. This gentleman is a veteran of the
3 Korean conflict and, aside from bailing an army buddy out of the brig back in the 1950s, he had
4 never had to deal with the criminal justice system. He was, in his words, "shocked" at the
5 confusion at his son's video hearing. The audio-video equipment was malfunctioning, his son's
6 bond was set so high "his knees buckled," and he was left wondering if his son was even
7 represented because he couldn't hear most of what was occurring. He wondered if some kind of
8 corruption was going on.

11 As an attorney who regularly attends Initial Appearance hearings live with the defendant
12 and the judge, where the prosecutor, victims and family members are present by video, counsel
13 attests that there are ongoing, sporadic problems with the audio and occasional problems with the
14 video at Initial Appearances.

16 As for the lawyer's being at his client's side during that initial time of tenuous trust and
17 fear, or being in a courtroom with a judge: failing to meet with a defendant in-person results in
18 missing information crucial to the hearing. The lawyer will miss physical signs of mental illness
19 (scars from suicide attempts, the client's adverting to voices not there) and addiction. He will
20 probably neither earn the client's trust, not elicit relevant information using video. Failing to
21 attend the live courtroom hearing puts the attorney on disparate footing with the prosecutor, and
22 appears to the public to put the defendant on disparate footing in the system.

24 Defendants are a disadvantaged group in terms of mental and physical health, education,
25 prior victimizations, and economics. Initial Appearances often form defendants' first
26 impressions of the fairness of the criminal justice system. To show them, and their families,
27 employers, and landlords, that our government does not think it is significant enough to
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1 physically provide a judge to look them in the eye and hear what they have to say before taking
2 away liberty, while still presumed innocent, especially when held based on an ex-parte, off the
3 record finding of probable cause, is a confidence- and respect-damaging way of serving justice.
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5 6 **III. In Pima County, "Live" Initial Appearances are Cost-Effective**

7 Pima County has two jail courtrooms, in separate buildings, in one jail complex. From
8 one courtroom to the other is a five-minute trip. One courtroom is public, where the prosecutor,
9 victims, and witnesses are present. Misdemeanor video hearings are held there but, immediately
10 following those, the judge takes the two-minute drive to the second courtroom at the interior jail
11 building. Defendants are present, along with the defense attorney, court staff, Pretrial Service
12 representatives, and corrections officers staffed at professionally determined levels. Interior jail
13 courtroom occupants see the prosecutor, victims and witnesses by video when they offer
14 statements.
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17 There is no need to compel felony defendants to appear by video in Pima County. Initial
18 Appearances with a physically-present judge already occur at the cost of a five-minute trip by the
19 judge for each of the two daily court sessions. That is a negligible cost compared to the benefits
20 of hearings where the judge looks the defendant in the eye in determining release conditions.
21 Even that trip could be eliminated if misdemeanor Initial Appearances were also face-to-face.
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23 Because Initial Appearance *release determinations* are based on information including
24 demeanor, physical characteristics, character, mental condition, and other facts from and about
25 the defendant, because our justice system *should* maintain a high degree of public confidence,
26 and because cost arguments are not compelling based on financial *facts* outweighing justice and
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1 integrity considerations, counsel respectfully requests that the court preserve the right to Initial
2 Appearances conducted with the live physical attendance of a magistrate.

3 RESPECTFULLY SUBMITTED this 16th day of July, 2009.
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5 Robert J. Hirsh
6 Pima County Public Defender

7 By 
8 JUDY A. LUTGRING

9 Original and six (6) copies mailed this
10 16th day of July, 2009 to:

11 Clerk of the Arizona Supreme Court
12 1501 W. Washington, Suite 402
13 Phoenix, AZ 85007

14 Copy delivered this
15 16th day of July, 2009 to:

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